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No. 93-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Waterfront Employers, Master Contracting Stevedore Association of the Pacific Coast, Inc., the Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. move for leave to file the brief *amici curiae* in support of Respondent, Newport News Shipbuilding and Dry Dock Company.

The Federal Petitioner has consented in writing to the filing of a brief *amici curiae* on behalf of the listed par-

ties, and such consent has been filed with the clerk of this Court. Respondent has not so consented.

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers subject to the Longshore and Harbor Workers' Compensation Act and a group self insurance facility, and thus have considerable expertise in adjudicating claims subject to the Act and adjudicating under the Petitioner's regulations and legal theories, since the creation of the agency.

Accordingly, *Amici* respectively move for leave to file the attached brief *amici curiae* in support of Respondent.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STATUTORY STANDING TO SEEK REVIEW OF BENEFIT REVIEW BOARD FINAL ORDERS	5
A. DOL's Legislative Regulations Conflict With the LHWCA's Adjudicatory Scheme	5
B. The LHWCA Specifically Excludes the Federal Petitioner From Aggrieved Party Status and Standing To Invoke the Jurisdiction of the Courts of Appeals To Review BRB Final Orders	11
C. The Legislative History Relied Upon by the Federal Petitioner Is Unavailing	13
D. The Federal Petitioner Is a Legislative Authority Unto Itself	15
II. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS STANDING TO ENFORCE CERTAIN PROVISIONS OF THE LHWCA	18
III. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS THE SAME ARTICLE III STANDING AS ANY OTHER LITIGANT	20
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 17
Cowart v. Nicklos Drilling Co., 505 U.S. —— (1992) 4, 16, 22
Director, OWCP v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978) 11
Director, Office of Workers' Compensation Programs v. Greenwich Collieries, —— U.S. —— (1994) 4, 6, 22
Director, Office of Workers' Compensation Programs v. Perini North River Associates, Inc., 459 U.S. 297 (1983) 4
Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994) 22
Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) 21
Morrison-Knudsen v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983) 4, 6, 16
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 4, 6, 10
P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) 5
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 5
Valley Forge Christian College v. Americans United For Separation Of Church and State, Inc., 454 U.S. 464 (1982) 21
Warth v. Seldin, 422 U.S. 490 (1975) 21

Constitution, Statutes, Regulations and Rules:

U.S. Constitution Art. III 14, 19, 20, 21
Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* 6, 12
5 U.S.C. § 551 ..... 6, 17
5 U.S.C. § 701 17
5 U.S.C. § 702 16
Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*
30 U.S.C. § 932(k) 14, 15

TABLE OF AUTHORITIES—Continued

Page

Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*
29 U.S.C. § 1132 13
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*
33 U.S.C. § 902(1) 12
33 U.S.C. § 902(6) 12
33 U.S.C. § 902(7) 12
33 U.S.C. § 908(f) 7
33 U.S.C. § 918 18
33 U.S.C. § 919(c) 7
33 U.S.C. § 919(d) 7
33 U.S.C. § 921 ..... 9, 18
33 U.S.C. § 921(b) 8, 10
33 U.S.C. § 921(c) ..... *passim*
33 U.S.C. § 921a 9, 16
33 U.S.C. § 932 7
33 U.S.C. § 939(a) 6
33 U.S.C. § 939(c)(1) 8
33 U.S.C. § 941(b)(5) 19
33 U.S.C. § 944 ..... 7, 19
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251 6
Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426, 98 Stat. 1639 4
Occupational Safety and Health Act, P.L. 91-598, 29 U.S.C. § 651 *et seq.*
29 U.S.C. § 660(a) 13
29 U.S.C. § 660(b) 13
Code of Federal Regulations
20 CFR § 701.201 7
20 CFR § 702.136 ..... 8, 18
20 CFR § 702.333 ..... 10, 18
20 CFR § 801.103 7
20 CFR § 801.104 7
20 CFR § 801.2(a)(10) 10
20 CFR § 802.410 ..... 10, 17, 18

TABLE OF AUTHORITIES—Continued

	Page
Federal Register	
38 *Federal Register* 2658 (Jan. 26, 1973)	10
38 *Federal Register* 26860 (Sept. 26, 1973)	10
42 *Federal Register* 16133 (March 25, 1977)	11
Federal Rules of Appellate Procedure	
Rule 15(a)	17
Rule 15(d)	19
Miscellaneous:	
Department of Justice Manual, Vol. 3, Title 4 Civil Division (1994-1 Supplement)	21
H. Rept. 92-1441, 92nd Congress, 2nd Sess. (1972)	6, 8
S. Rept. 92-1125, 92nd Congress, 2nd Sess. (1972)	6, 8
S. Rept. 95-209, 95th Cong., 1st Sess. (1977)	14
Secretary of Labor's Order No. 1-90 [55 *Federal Register* 9033 (1990)]	19
OWCP *Annual Report To Congress FY 1993*, U.S. DOL, Employment Standards Administration, Office of Workers' Compensation Programs	7

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF RESPONDENT

THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto

Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

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Amici collectively comprise the majority of insured and self-insured employers and insurance carriers subject to the Longshore and Harbor Workers' Compensation Act and a group self insurance facility, and thus have considerable expertise in adjudicating claims subject to the Act and adjudicating under the Petitioner's regulations and legal theories, since the creation of the agency.

SUMMARY OF ARGUMENT

Despite the Federal Petitioner's assertion that the Longshore and Harbor Workers' Compensation Act ("LHWCA") and its regulations confer statutory standing on the Director, Office of Workers' Compensation Programs to seek appellate review of final compensation orders issued by the Department of Labor, a close reading of the Act, particularly the amendments made by Congress in 1972, reveals otherwise. The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251, clearly set forth a comprehensive regulatory scheme and specifically delegate a limited adjudicative role to the Secretary of Labor and limited subject matter jurisdiction to the federal appellate courts. Included in this limited delegation is the question of which parties have statutory standing to invoke the jurisdiction of the courts of appeals to seek review of the Department's own final administrative orders. The LHWCA is unambiguous on this point; the Federal Petitioner is simply not one of these parties.

Indeed, while apparently having been overlooked by every circuit court to have considered the question thus far, the LHWCA contains a specific definition of "person" that, in turn, clearly limits which parties can be "adversely affected or aggrieved *persons*" for purposes of invoking the jurisdiction of the appellate courts. The Secretary of Labor/Director, Office of Workers' Compensation Programs, not being an "individual, partnership, corporation, or association" clearly falls outside this statutory definition of "person." Therefore, read and applied properly, an unambiguous LHWCA simply does not confer statutory standing upon the Federal Petitioner. In this regard, the LHWCA is entirely consistent with the judicial review provisions of the Administrative Procedures Act ("APA").

More importantly, as the federal courts are courts of limited jurisdiction, the appellate courts are without statu-

tory jurisdiction to entertain an appeal of an agency final order from a non-aggrieved person, such as the Federal Petitioner. The Federal Petitioner's regulations and arguments, in effect, seek to expand the jurisdiction of the federal appeals courts.

Notwithstanding the Secretary's limited adjudicatory role, the Federal Petitioner has openly ignored those provisions of the 1972 Amendments and the subsequent Congressional Amendments made in 1984 [1] that it finds inconvenient, e.g., the incorporation of the Administrative Procedures Act, see *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. —— (1994); or has attempted to rewrite the statute through expansive regulations and/or *ad hoc* litigating positions in the courts of appeals at the expense of the Congressionally mandated scheme. See *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992); *Morrison-Knudsen v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624 (1983).

The Department's regulatory revisionism could not be better illustrated than by the muddled jurisprudence put forth in the Federal Petitioner's Brief. Only by intertwining unambiguous LHWCA statutory directives and conflicting regulations that are promulgated solely to enhance Petitioner's authorized role in the process, at the expense of the statutory scheme, can Petitioner advance her standing theories.

This is not the first time that this Court has noted but left unresolved the standing question. It has caused considerable confusion since the initial judicial interpretations of the 1972 Amendments. See, e.g., *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 256 n.11 (1977); *Director, Office of Workers' Compensation Programs v. Perini North River Associates, Inc.*, 459 U.S. 297, 303 n.11 (1983). This Court can finally resolve the issue simply by applying the unambiguous language of the LHWCA and the APA, and affirming the decision below.

[1] The Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426, 98 Stat. 1639.

ARGUMENT

I. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STATUTORY STANDING TO SEEK REVIEW OF BENEFIT REVIEW BOARD FINAL ORDERS.

Contrasting the underlying adjudicatory scheme of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act") with the Department of Labor's ("DOL") subsequent regulations exposes the fact that the Federal Petitioner consistently oversteps her authorized adjudicatory role delegated by Congress in 1972. A close reading of the two schemes leads to the inescapable conclusion that the Petitioner's confusing and insupportable regulations simply ignore an unambiguous statutory scheme. Included in her regulations are several provisions bearing on the precise question of statutory standing now before this Court—including a *regulation* granting appellate standing to the Federal Petitioner, notwithstanding specific LHWCA language to the contrary!

A. DOL's Legislative Regulations Conflict With the LHWCA's Adjudicatory Scheme.

The LHWCA is a federal workers' compensation statute enacted by Congress in response to this Court's opinion that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the U.S. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Congress modeled the Act after the N.Y. State Workmen's Compensation law but designed it to recompense certain classes of maritime workers for the loss of earnings due to injuries sustained during covered employment. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69

(1979); *Morrison-Knudsen v. Director OWCP*, 461 U.S. 624 (1983). The Act was largely revised by Congress in 1972 in an attempt to reconcile the competing interests comprising the maritime industry, and produce a compensation scheme fair to one and all of these private sector interests. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, (1977).

Any analysis of Petitioner's standing argument must start with the 1972 reform of the Act's adjudicatory procedures. Congress found the then existing dispute resolution process wanting because it "[Failed] to keep separate the functions of administering the program and sitting in judgment on the hearings[.]" H. Rept. 92-1441, p. 11, 92nd Congress, 2nd Sess.; S. Rept. 92-1125, p. 13-14, 92nd Congress, 2nd Sess.

To cure this defect Congress substantially overhauled the Act's entire dispute resolution process with the enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251, ("1972 Amendments"). Included amongst these reforms was the application of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, to all hearings conducted within the Department, *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. —— (1994); the creation of an administrative review agency, the Benefits Review Board ("BRB"), within the operational control of the DOL, *Caputo* at 254, n.3; and a recommendation that the Secretary of Labor "take full advantage of the requirement of separating the functions. . . . to consider a complete reorganization . . ." S. Rept. 92-1125, p. 14; H. Rept. 92-1441, p. 11.

The amended LHWCA presently directs the Secretary of Labor ("Secretary") to "*administer* the provisions of the Act" and authorizes him "to make such rules and regulations . . . as may be necessary in the *administration* of this Act." 33 U.S.C. 939(a). The Secretary in turn

has delegated "all functions . . . with respect to the administration or benefits programs" of the Act to the Office of Workers' Compensation Programs ("OWCP") and designated a Director ("Director") to administer the program, 20 CFR § 701.201. The reorganization requested by Congress, as noted above, became complete with the Secretary's placement of the "quasi-judicial" BRB in the Office of the Deputy Secretary, along with the rulemaking power of this "independent" agency. 20 CFR §§ 801.103 and 801.104.

Among the Director's principal day to day administrative functions are: the initial handling and investigation of claims, 33 U.S.C. § 919(c), the assignment of disputed claims to ALJs for resolution, 33 U.S.C. § 919(d); administering the LHWCA § 44, 33 U.S.C. § 944, Special Trust Fund, designed primarily to encourage the hiring of disabled workers as set forth in LHWCA § 8(f), 33 U.S.C. § 908(f)[2]; and authorizing insurance carriers and self-insured employers to assume LHWCA risk, and fixing the latter's financial reserves to cover any possible default on claims obligations, 33 U.S.C. § 932.[3]

Under the amended LHWCA Act there is no provision for the Department to initiate a claim or to become a party to a claim during administrative proceedings under the guise of representing the Director. The 1972 Amendments only authorize the Secretary to provide "legal *assistance . . . in processing a claim*" to claimants "upon

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[2] In Calendar year 1993 the § 44 Special Trust Fund collected over $102 million dollars in assessments from covered employers and insurance carriers, and paid out over $103 million dollars to some 4,652 second injury fund claimants and others qualifying for secondary § 44 benefits. *OWCP Annual Report To Congress FY 1993*, U.S. DOL, Employment Standards Administration, Office of Workers' Compensation Programs.

[3] Currently The Director, OWCP has custody of nearly $2 billion in collateral from authorized self-insured employers.

request." 33 U.S.C. § 939(c)(1) (emphasis added).[4] Despite the fact that this language clearly does not authorize representation of claimants at either the ALJ or BRB level, or in the appellate courts, it blossomed in subsequent OWCP implementing regulations to become "Legal *representation* of the claimant in *adjudicatory* proceedings may be furnished in cases in which the Secretary's interest in the case is not adverse to that of the claimant." 20 CFR § 702.136. (emphasis added).[5]

At the administrative hearing level the 1972 Amendments authorize appeals to the BRB of ALJ decisions presenting questions of law or fact, but only by any "party in interest." 33 U.S.C. § 921(b)(3). Given the further statutory directive that the BRB need not obtain the consent of the "parties in interest" to remand an ALJ decision, but rather may do so "on its own motion or at the *request of the Secretary*" it is absolutely clear that Congress never intended to make the Secretary/Director a party in interest at the administrative hearing level. In

[4] 33 U.S.C. § 939(c)(1) reads as follows: "(c)(1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available." *Amici* note that in the instant case the claimant below specifically declined to further participate after the Circuit Court rendered its decision.

[5] Evidently the Federal Petitioner is not comfortable in defending the obvious discrepancy between 33 U.S.C. § 939(c)(1) and 20 CFR § 702.136 because the latter is entirely ignored on brief. Perhaps this is also due to the fact that both the Senate and House Reports suggest that assistance, whatever its nature, be limited to "needy cases" or "where the employee is either indigent or of minimal means." S. Rept. 92-1125, p. 15, 92nd Congress, 2nd Sess. and H. Rept. 92-1441, p. 13, 92nd Congress, 2nd Sess.

fact, the Federal Petitioner's sole statutory role in the entire dispute resolution process is to seek remand at the BRB level of an ALJ decision with which it disagrees. 33 U.S.C. § 921(b)(4).

Another key provision of the 1972 Amendments expressly authorizes attorneys appointed by the Secretary to represent the Secretary/Director and the BRB "[]in any *court* proceedings under § 21 or other provisions of this Act . . .", other than those before this Court. 33 U.S.C. § 921a (emphasis added).[6] In turn, LHWCA § 21 authorizes only two distinct court proceedings, both concerning final compensation orders: § 21(c) authorizes appellate review of a final BRB order sought by "adversely affected or aggrieved 'persons' "—*which statutory definition specifically excludes the Secretary of Labor*—see discussion below at I-B, and enforcement actions of unpaid final orders, to U.S. District Courts, § 21(d). The question of standing to invoke appellate court jurisdiction to review under § 21(c) is the real issue before this Court.

Undeterred by the unambiguous statutory restrictions found at 33 U.S.C. §§ 921(b)(3) and (4) and 921(c), as noted above, OWCP's implementing regulations later mushroomed, *sub silentio*, to "[T]he Solicitor of Labor

[6] LHWCA § 21a reads as follows: "Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under § 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States." 33 U.S.C. § 921a. The Federal Petitioner interprets "represent" to mean "participate," and thus authorizing participation and standing to seek appellate review of the Department's own final administrative orders. Pet. Br. at 14. *Amici* submit that this construction of the Act stands the logic behind administrative law—final agency action followed by judicial review sought by an aggrieved person—on its head. Under Petitioner's construction, final *agency* action is simply not final because Petitioner can continue to litigate against a disfavored party in the appellate courts.

. . . may appear and participate *in any formal hearing* held pursuant to these regulations on behalf of the Director as an interested party." 20 CFR § 702.333 (emphasis added).[7] Not to be outdone, BRB regulations also granted party in interest status to the Secretary or his designee. 20 CFR § 801.2(a)(10).

Later still, after certain Courts expressed confusion as to whether the BRB or the Director was the proper party for purposes of judicial review, or even if the DOL had standing in the first place, see, e.g., *Caputo*, 432 U.S. 249 n.11 (1977), the Secretary attempted to cure this confusion by permitting "any party adversely affected or aggrieved . . . to petition for review . . ." and "deeming" the Director, OWCP "the proper party . . . for all review proceedings conducted pursuant to § 21(c) of the LHWCA." 20 CFR § 802.410.[8] This was done in a typically obscure manner, i.e., in BRB regulations, vice

[7] Proposed Regulations found at 38 *Federal Register* 2658 (Jan. 26, 1973) for the 1972 adjudication scheme first contained the following provision: "§ 702.333 Formal hearings; parties. The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case." The final regulation, *promulgated without notice or opportunity to comment* at 38 *Federal Register* 26860 (Sept. 26, 1973), redesignated the original provision as "(a)" and added a new subsection "(b)" as follows:

"(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party."

[8] 20 CFR § 802.410 reads as follows: "Judicial review of Board decisions. (a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such a decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to § 21(c) of the LHWCA. (b) The Director, OWCP, as the designee of the Secretary responsible for the administration and enforcmeent of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to § 21(c) of the LHWCA."

OWCP regulations. See 42 *Fed. Reg.* 16133 (March 25, 1977).

Since 1972 the Department has promulgated this unauthorized maze of regulations solely to enhance the Federal Petitioner's role in LHWCA adjudications over and above that actually provided for by the Act's dispute resolution scheme, and contrary to Congress' intent to separate the Act's adjudicatory and administrative functions. The Federal Petitioner's standing argument depends entirely upon intertwining the statutory scheme and conflicting Departmental regulations, and misleading the appellate courts in the process. It appears that the Federal Petitioner has been quite successful in so doing, judging from post 1972 litigation, even to the point of expanding federal appellate court jurisdiciton beyond that delegated by Congress in LHWCA § 21(c).

In addition to her unauthorized regulations, the Federal Petitioner has chosen to ignore the key statutory provision governing which parties have standing to seek appellate review and which do not, discussed immediately below.

B. The LHWCA Specifically Excludes the Federal Petitioner From Aggrieved Party Status and Standing To Invoke the Jurisdiction of the Courts of Appeals To Review BRB Final Orders.

While apparently not noticed by the Court below or any other circuit court to consider the question of standing, see e.g., *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978), the LHWCA could not be more unambiguous as to which parties have standing to seek review of BRB orders and which do not.[9]

As repeatedly pointed out by the Federal petitioner, the LHWCA confers standing on "any *person* adversely af-

[9] The Court below raised the issue on its own, and thus did not have the benefit of briefs from those who deal with the statute on a daily basis and are thus familiar with the minutiae of the Act.

fected or aggrieved" by a final order of the BRB to seek review of that order in the appropriate court of appeals. LHWCA § 21(c), 33 USC § 921(c).[10]

However, while both unremarked below and absent from Petitioner's Brief, the fact is that § 2(1) of the LHWCA specifically defines the term "person." This section clearly limits person to an "[] individual, partnership, corporation, or association." 33 U.S.C. §902(1). Obviously this limitation specifically excludes the Secretary of Labor and deputy commissioners, terms also defined respectively by §§ 2(6) and 2(7) of the Act, from becoming " 'persons' adversely affected or aggrieved" for purposes of seeking § 21(c) appellate review.

The conclusion that the LHWCA denies the Federal Petitioner access to the appellate courts to seek review of the Department's own final orders is inescapable given this fundamental definition of who can be an aggrieved person authorized to invoke the jurisdiction of the appellate courts. Federal Petitioner's muddled jurisprudence is designed to obfuscate this fact.

The 1972 Amendments limit the Secretary's dispute resolution role to the administrative adjudication of disputes between private parties. Only one or more of these private litigants may become aggrieved by a final order of the BRB, and thus have standing to seek appellate review under the LHWCA § 21(c). LHWCA review is thus entirely consistent with the judicial review norms and procedures of the Administrative Procedures Act ("APA"). See I-D and n.13, *infra*. The Act's judicial review provisions round out the LHWCA adjudicatory scheme, and complete Congress' goal of separating the Act's adjudicatory and administrative functions.

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[10] 33 U.S.C. § 921(c) reads as follows: "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, . . ."

Federal Petitioner's LHWCA role is exactly like that of the industrial commissioner under the N.Y. State Workers' Compensation Law or, for that matter, every state administrative agency charged with enforcing a state compensation law. To the best of *Amici*'s knowledge, not one of these state agencies has statutory standing to choose sides in a compensation dispute between private parties and seek appellate review of its own final administrative determination. And neither do any of those independent federal agencies alluded to in Petitioner's list of cases submitted on Brief at 15.

By way of contrast, Congress knows how to confer standing on the Secretary of Labor when a statutory scheme so dictates. E.g., when Congress considered and passed the Occupational Safety and Health Act, P.L. 91-598, two years before overhauling the LHWCA in 1972, Congress specifically conferred standing on the Secretary to obtain review of any final order issued by the Occupational Safety and Health Review Commission, along with "persons adversely affected or aggrieved" by final Commission orders. 29 U.S.C. §§ 660(a) and (b). Statutory standing here should come as no surprise given the Secretary's *prosecutorial* function, a feature of the OSH Act clearly not found in the LHWCA. See also the enforcement provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1132, P.L. 93-406, enacted two years after the 1972 Amendments.

C. The Legislative History Relied Upon by the Federal Petitioner Is Unavailing.

The Federal Petitioner contends that "Congress could hardly have intended [the 1972 Amendments] to divest the Act's administrator of her pre-1972 authority to seek review . . . on . . . claims that are adverse to her position." Pet. Br. at 27. Congress, of course, did exactly that with the 1972 reforms to the Act's adjudicatory scheme, which fully accomplished the drafters' stated in-

tention to "separate the functions" within the Labor Department. As outlined above, the 1972 Amendments split the Act's adjudicatory functions, i.e., administrative adjudication/internal review/ and judicial review of final agency orders, from the Director's administrative functions, thus placing the agency on the same established administrative law footing as other federal agencies with combined law enforcement responsibilities.

The Petitioner counters the LHWCA's unambiguity with language in a Senate Report dealing with the 1978 Amendments to the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, stating that "the Secretary's interest . . . should be deemed sufficient to confer standing[]" Pet. Br. at 29, quoting S. Rept. 95-209, 95th Congress, 1st Sess., 21-22 (1977). The Petitioner gleans from this that the "Director's interest in the resolution of compensation claims is sufficient to confer standing to appeal." Pet. Br. at 28. This "unambiguous expression of congressional intent," as the Petitioner labels the Senate Report, Pet. Br. at 30, appears to *Amici* to be both an admission that statutory standing is indeed not conferred on the Secretary/Director, as *Amici* demonstrate above at I-A and B, and a claim of Article III standing based on the regulatory nexus between the Director's responsibilities and the Act.

Amici submit that the Senate Labor Committee is no better positioned to "deem" Article III standing than is the Secretary in BRB regulations. See I-A and n.8. Neither has the constitutional provenance to do so, whether in a committee report or in legislative regulations. To be sure, Congress certainly may enact a statute permitting designated parties to invoke the jurisdiction of a specified court, but only within Article III "case or controversy" bounds. Congress did so in the LHWCA, as noted above, and the Federal Petitioner is not one of those designated parties.

Amici further note that this "legislative history" appeared in Committee reports written 5 years after enactment of the 1972 Amendments and, while it deals with amending a statute that shares a common dispute resolution process, that statute is three Code Titles removed from the LHWCA. Furthermore, *Amici* submit that the similarity of purpose and proximity of this Senate Report to the BRB regulation, both appeared in 1977, raises the specter of entirely bogus legislative history. Moreover, Congress could certainly have rewritten the LHWCA scheme in a fashion that would have given the Federal Petitioner statutory standing to seek review when the LHWCA was later amended in 1984, but chose not to do so.[11]

D. The Federal Petitioner Is a Legislative Authority Unto Itself.

The DOL/OWCP/BRB is, on its face, a typical unitary agency, combining rulemaking, enforcement, and administrative adjudications under one roof. However, unlike those federal law enforcement agencies that perform both prosecutorial and adjudicatory functions, the Department's primary LHWCA function is the adjudication of contested claims between two or more *private* parties using the Agency's published regulations and procedures. OWCP is not a prosecutor. As demonstrated above at I-A and B, the Federal Petitioner's regulations fail to make this distinction; the LHWCA does not.

As noted above at I-A and n.6, § 21a of the Act requires the Secretary to appoint attorneys to represent the

[11] E.g., along the lines of the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* This Act specifically makes the Secretary a party in any claim proceeding. 30 U.S.C. § 932(k). Given the BLBA's financing mechanism for the payment of benefits, a mandatory trust fund administered by the Secretary, Congress understood that authorizing statutory standing is critical in order to protect the integrity of the fund. This is wholly different than the principal payment scheme of the LHWCA, which is employer/carrier to claimant.

Director and the BRB in any authorized court proceedings. In practice both the OWCP and the "quasi-independent" BRB share the same attorneys and legal advice from the Office of the Solicitor of Labor.[12] If this commingling of functions at the legal advisory level is not an outright conflict of interest or failure of procedural due process, at the very least it explains the Department's ongoing propensity to enhance its adjudicatory role at the expense of both the LHWCA and federal administrative law.

Not content to rewrite the adjudicatory provisions of the LHWCA, as noted above, the Federal Petitioner's regulations and standing arguments also eviscerate the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, and make a mockery of Rule 15(a) of the Federal Rules of Appellate Procedure. The former mirrors the review provisions of the LHWCA, by denying an agency standing to seek judicial review of its own final administrative orders, and thus the opportunity, in effect, to continue to prosecute a disfavored party.[13] The latter designates the agency in fact

[12] § 21a of the Act only requires the Secretary to appoint attorneys to represent the Director and the BRB. There is no requirement that these attorneys be one and the same. Given the legislative history outlined above in I-A, it is clear that Congress expected a division of responsibility at the legal advisory level as well as a complete separation of adjudication and administrative responsibilities within the Agency. This division never occurred. *Amici* submit that this is the flaw in the administration of the Act that, in turn, leads to recurring litigation flip-flops and other embarrassments before this Court. See, e.g., *Morrison-Knudson* at 645 ("The Director has now switched sides. Of course, agencies often make mistakes and disavow prior positions. . ."); *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992) (slip opinion at 6) ("[T]he Director of the OWCP and the Department of Labor have altered their position. . . .").

[13] 5 U.S.C. § 702 entitles a "*person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial

responsible for the final order affecting the private litigants, as the proper and necessary federal respondent; in LHWCA adjudications this can only be the "quasi independent" BRB. Nothing in the LHWCA is to the contrary. However, the Federal Petitioner's regulations are. 20 CFR § 802.410(b) "deems" the Director, as the designee of the Secretary, the proper party "in all review proceedings conducted pursuant to § 21(c) of the LHWCA."[14]

It is axiomatic that the Secretary cannot assume legislative powers not delegated by Congress. *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *Amici* submit that the Secretary has indeed done so. The Federal Petitioner's legislative regulations go well beyond a permissible construction of the congressional directives to the Secretary to: provide legal assistance in processing claims; appoint attorneys to represent the Secretary and the BRB in designated *court* proceedings; and seek remand of BRB decisions with which the Secretary/

review. 5 U.S.C. § 701, in turn, applies the definition of person found in 5 U.S.C. § 551, which limits "person" to a slightly broader class than that found under the LHWCA, but still excludes federal agencies. Considering that the Federal Petitioner took the position in *Greenwich Collieries* that the APA doesn't apply to LHWCA adjudications, it should come as no surprise that she also chooses to ignore the judicial review standards of the APA.

[14] Taken to its logical conclusion, FRAP Rule 15(a), read together with the Federal Petitioner's regulations governing appellate standing, as noted above, could well lead to the ultimate absurdity, i.e., *Director, OWCP v. Director, OWCP*, not a very beneficial way of spending the taxpayer's funds and certainly not invited by the drafters of the LHWCA or the APA. This is not as far fetched as it might seem. See, e.g., *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (1982) (holding that the Director, OWCP "shall be named as federal party respondent in all petitions for review. . . ."). Thus far the courts have bought the Department's regulatory view, even though it leaves the BRB an orphan whenever review takes place, unless the Director happens to agree with the Board's final order.

Director disagrees. By promulgating the regulations noted above, particularly those found at 20 CFR § 702.136 (authorizing legal representation in adjudicatory proceedings), § 702.333(b) (granting Director party status), and § 802.410 (granting Director appellate standing), the Federal Petitioner has chosen to ignore both the unambiguous adjudicatory procedures proscribed by Congress in 1972 and the judicial review provisions of the Administrative Procedures Act. It has in fact become a legislative authority unto itself.

Only this Court can effectively return the DOL/OWCP back to the norms of administrative law. The agency, by whatever nomenclature, is a federal agency subject to the proscriptions of Congress and the Federal Rules of Appellate Procedure.

II. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS STANDING TO ENFORCE CERTAIN PROVISIONS OF THE LHWCA.

In reaching its decision the Court below ignored each and every one of the Federal Petitioner's regulations noted above, as indeed it must, given the fact that they do not reflect the LHWCA's adjudicatory scheme. The Court—correctly—distinguished those interests of the Director that would support appellate standing, couching them in terms of the Director's "pecuniary/economic" or "legitimate administrative" interests.

Amici submit that a more logical distinction would be along the lines of the Director's bona-fide law *enforcement* actions. Besides the adjudicatory and administrative functions assigned the Secretary, as noted above, the LHWCA requires enforcement of certain specified statutory functions: e.g., compensation orders whenever an employer fails to comply with an order, 33 U.S.C. § 921(d) or defaults in the payment due under any award, 33 U.S.C. § 918: Special Fund rights and protections

under 33 U.S.C. § 944(d)(1) and (3): and safety rules and regulations, 33 U.S.C. § 941(b)(5), largely overtaken by the passage of the Occupational Safety and Health Act in 1970 and thus delegated to the Assistant Secretary for Occupational Safety and Health. See Secretary of Labor's Order No. 1-90 [55 *Federal Register* 9033 (1990)].

Each of these enforcement activities is clearly spelled out as such by the plain language of the LHWCA and directed to U.S. District Courts. Together these provisions provide the Director a wide array of remedies sufficient to carry out her enforcement responsibilities. This is unchanged from the pre-1972 enforcement scheme, before Congress intentionally separated the adjudicatory functions, i.e., adjudication/administrative review/appellate review, from the Department's administrative responsibilities in the 1972 Amendments. Moreover, none of these activities is likely to be raised by an aggrieved person in a § 21(c) appeal.

Obviously the Director is authorized to conduct these enforcement activities in U.S. District Courts and seek review of trial court decisions in the appellate courts as necessary, and may do so utilizing attorneys appointed by the Secretary under the "other provisions of this Act" language of LHWCA § 21(a). Furthermore, should an enforcement issue, such as the protection of the Special Fund, arise in the context of a LHWCA § 21(c) appeal, as it did below, the Federal Petitioner can seek to intervene pursuant to FRAP Rule 15(d) in order to protect her enforcement obligations. Alternatively, the Federal Petitioner can seek appellate court review should she suffer "injury in fact" sufficient to meet Article III case or controversy requirements, see III below, and identify a statutory basis, other than § 21(c), for that jurisdiction.

Amici submit that the Director's enforcement obligations and her economic interests are one and the same. Therefore, unlike the § 21(c) standing issue now before

this Court, *Amici* do not question the Director's standing regarding any of these statutory enforcement activities.

III. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS HAS THE SAME ARTICLE III STANDING AS ANY OTHER LITIGANT.

In addition to the muddled statutory/regulatory standing argument outlined on Brief, Petitioner asserts that the Secretary, through his designee, the Director, Office of Workers' Compensation Programs, is the administrator of the Longshore and Harbor Workers' Compensation Act, with statutory authority to implement regulations. Therefore, Petitioner appears to be arguing that this regulatory nexus alone is sufficient to confer Article III standing on the Secretary/Director to seek appellate review of all BRB decisions as a matter of right "to advance . . . the public interest, to efficient[ly] . . . administer and enforce" the Act, and to protect 'societal interests.' Pet. Br. at pp. 18, 19 and 24, respectively.

As noted above, in the present case the relevant statutes —the LHWCA and the APA—specifically deny standing to the Secretary to seek review of a § 21(c) dispute between aggrieved persons. More importantly, this LHWCA provision, relied upon below by the Federal Petitioner for subject matter jurisdiction, by its clear terms withholds such jurisdiction from the appellate courts. Appellate courts simply may not entertain appeals from persons not specifically designated aggrieved by § 21(c), such as the Federal Petitioner.

So the question then becomes—does the Federal Petitioner ever meet the Article III requirements necessary to invoke the jurisdiction of the appellate courts and, if so, under what circumstances? The Congressional delegation of standing/court jurisdiction, or the lack thereof, are solely questions for that federal courts. Neither may be "deemed" by regulation or Senate Report, as the Petitioner argues.

The Federal Petitioner, like any other litigant, must suffer an injury in fact satisfying the case or controversy requirements of Article III in order to invoke the jurisdiction of the courts, if so provided by Congress.[15] In this case, as the court below noted, the Federal Petitioner has neither suffered a "distinct and palpable" injury, *Valley Forge Christian College v. Americans United For Separation Of Church and State, Inc.*, 454 U.S. 464, 475 (1982); *Warth v. Seldin*, 422 U.S. 490, 501 (1975), nor a "concrete and particularized, actual or imminent invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2134 (1992) and therefore is without Article III standing to appeal a final order of the BRB outside the context of a § 21(c) appeal. *Amici* submit that the Director's regulatory nexus theory, like the "animal" nexus and "vocational" nexus found "beyond all reason" in *Lujan*, is insufficient to meet Article III standing requirements.

On the other hand, the Director may well incur injury in fact sufficient to confer Article III standing in certain circumstances, e.g., whenever a BRB order conflicts with her delegated statutory enforcement responsibilities, as noted above at II, providing she can first identify a statutory basis conferring appellate jurisdiction other than that denied her by LHWCA § 21(c).

CONCLUSION

In 1972, Congress set forth a specific method of adjudicating claims under the LHWCA, which includes a clearly defined role for the Federal Petitioner. The LHWCA scheme is entirely consistent with the APA. Notwithstanding both of these statutory dictates, the Federal Petitioner has usurped her authorized authority by

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[15] See, e.g., the *Department of Justice Manual*, Vol. 3, Title 4-2.130, Standing to Sue, Civil Division, 1994-1 Supplement. ("The case or controversy clause of Article III of the Constitution imposes a minimal constitutional standing requirement *on all litigants* attempting to bring suit in federal court.") (emphasis added).

carving out an enhanced role for herself through unauthorized legislative regulations. Central to this role is her claim of standing to invoke the jurisdiction of federal appellate courts to review the Department's own final administrative orders. There is nothing novel in Petitioner's contention. It has become comonplace for her to ignore inconvenient statutory directives. See, e.g., *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. —— (1994); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3rd 130 (5th Cir. 1994).

However, as demonstrated above, neither the LHWCA nor the APA provide the Federal Petitioner with such statutory standing, or the federal appeals courts with the jurisdiction to entertain an appeal from her in these circumstances. To do so would stand the logic of administrative law, i.e., final agency action followed by judicial review, on its head.

Therefore, *Amici* submit that the decision below is correct on the basis of both the plain language of the LHWCA and the APA. As this Court has held repeatedly, "The controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Cowart v. Nicklos Drilling Co.*, 505 U.S. —— (1992) (slip opinion at 6).

The decision below, *Amici* respectfully submit, must therefore be affirmed.

Respectfully submitted,

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